

<sup>2</sup> 5 U.S.C. § 8101 *et seq.*

## **ISSUE**

The issue is whether appellant has met his burden of proof to establish a recurrence of disability commencing February 18, 2016, causally related to his accepted April 23, 2008 employment injury.

## **FACTUAL HISTORY**

On April 29, 2008 appellant, then a 33-year-old criminal investigator, filed a traumatic injury claim (Form CA-1), alleging that on April 23, 2008 while in the performance of duty he was conducting a “mobile surveillance/arrest” and hit his head on the roof of the surveillance van he was riding in when it went over a large speed bump. He indicated that he sustained a concussion and contusions to his head and experienced headaches. By decision dated June 16, 2008, OWCP accepted the claim for head contusions.

In a report dated June 29, 2016, Dr. Erin M. Elmore, a Board-certified neurologist, indicated that she first saw appellant for a neurological evaluation on April 7, 2015. She explained that the consultation was for a one-year duration of weakness in his upper extremities, following an incident the summer prior when appellant experienced an acute onset of right-sided neck pain with pain radiating down his right arm after turning his head quickly to the side. Dr. Elmore noted that he did not seek any immediate medical attention following this incident. She also noted a prior injury where he hit his head on a metal shed door while working as a firearms instructor without any reported loss of consciousness, but with reports of headaches and increased neck pain. She further noted appellant’s April 23, 2008 work-related injury where he hit his head on the ceiling of a van after it went over a speed bump. Dr. Elmore indicated that he lost consciousness and developed severe headache with neck pain following this incident. She related that appellant eventually underwent cervical fusion surgery on February 18, 2016, which improved his neck pain, migraines, and shooting pains. Dr. Elmore concluded that appellant had a long-standing history of neck issues dating back to 2008 when he was originally injured in the van. Magnetic resonance imaging (MRI) scans following the 2008 injury revealed damage to the disc at C4-5 and C5-6, especially to the left and subsequent worsening disc pathology at C4-6. Dr. Elmore opined that appellant’s cervical condition and subsequent surgery was causally related to his accepted April 23, 2008 employment injury and advised that his overall recovery from the fusion surgery might take a year or more to establish.

On August 26, 2016 appellant filed a notice of recurrence (Form CA-2a), alleging that he sustained a recurrence of total disability on February 18, 2016. He explained that, following his original injury on April 23, 2008, his pain worsened over time and he lost significant upper body strength until he was unable to perform all of his employment duties. On the reverse side of the claim form, the employing establishment indicated that appellant underwent surgery to address his back and neck pain on February 18, 2016, the date in which he alleged a recurrence of disability.

By development letter dated October 3, 2016, OWCP advised counsel that appellant’s claim had been closed as he had not lost any time from work or sought any medical attention following the April 23, 2008 accepted employment injury. It advised that he had another work injury on June 8, 2012 under OWCP File No. xxxxxx011 and it might be more appropriate for appellant to file a recurrence claim under that case.

In a letter dated October 14, 2016, counsel indicated that he had filed a recurrence claim under OWCP File No. xxxxxx011 as he had been advised, but suggested that the medical evidence supported that the recurrence was related to the April 23, 2008 employment injury.

By letter dated October 20, 2016, counsel reiterated his argument and submitted an October 7, 2016 report from Dr. George V. DiGiacinto, a Board-certified neurosurgeon. Dr. DiGiacinto indicated that he first saw appellant in February 2008 and he complained about chronic pain in his back for about 10 years. Appellant had a history of playing football and weightlifting and had been told in the past of “fracture” and disc desiccation. At that time, he complained primarily of low back pain. Appellant related that he later sustained an employment-related head and neck injury on April 23, 2008 while working in a surveillance van. He stated that prior to this incident, he had no neck pain or other injury and thereafter, developed progressively worsening neck issues and migraines. When Dr. DiGiacinto saw appellant in 2016, appellant indicated that he had had an exacerbation of his condition in 2015 while working out and lifting at a gym when he felt a “pop” in his neck and developed numbness down his right arm with tremendous weakness. An MRI scan at the time demonstrated pathology at C5-6 on the right foraminal encroachment at C6-7. Dr. DiGiacinto opined that the accepted April 23, 2008 work injury was a major causative factor in appellant requiring a cervical and lumbar spine surgery.

In response to counsel’s October 20, 2016 correspondence, on October 21, 2016, OWCP advised counsel that appellant’s case was only accepted for head contusions and there was no operative report in the file to support that appellant underwent surgery on February 18, 2016.

In a November 9, 2016 development letter, OWCP advised appellant of the deficiencies of his claim and afforded him 30 days to submit the requested evidence.

In response, appellant submitted a copy of an operative report indicating that he had undergone an anterior cervical discectomy at C5-6 and C6-7 on February 18, 2016, performed by Dr. DiGiacinto.

By decision dated February 9, 2018, OWCP denied appellant’s recurrence claim for disability commencing February 18, 2016, finding that the medical evidence of record was insufficient to establish a material change or worsening of his accepted April 23, 2008 employment injury.

On February 22, 2018 counsel requested an oral hearing before an OWCP hearing representative.

Appellant subsequently submitted a June 2, 2015 report from Dr. John E. Robinton, a Board-certified neurologist, who opined that appellant’s electromyography (EMG) and nerve conduction studies revealed evidence of polyradiculopathy.

An oral hearing was held before an OWCP hearing representative of the Branch of Hearings and Review on June 14, 2018. Appellant provided testimony and the hearing representative held the case record open for 30 days for the submission of additional evidence.

Appellant subsequently submitted an addendum report dated July 2, 2018 from Dr. Elmore who reiterated her medical opinions.

By decision dated August 21, 2018, OWCP's hearing representative affirmed OWCP's prior decision. She found that the evidence of record was insufficient to establish a return or increase of disability due to a consequential injury or condition stemming from his accepted head contusions.

### **LEGAL PRECEDENT**

A recurrence of disability means an inability to work after an employee has returned to work, caused by a spontaneous change in a medical condition which resulted from a previous compensable injury or illness and without an intervening injury or new exposure in the work environment.<sup>3</sup> This term also means an inability to work because a light-duty assignment made specifically to accommodate an employee's physical limitations and which is necessary because of a work-related injury or illness is withdrawn or altered so that the assignment exceeds the employee's physical limitations.<sup>4</sup>

OWCP procedures provide that a recurrence of disability includes a work stoppage caused by a spontaneous material change in the medical condition demonstrated by objective findings. That change must result from a previous injury or occupational illness rather than an intervening injury or new exposure to factors causing the original illness. OWCP does not include a condition that results from a new injury, even if it involves the same part of the body previously injured.<sup>5</sup>

An employee who claims a recurrence of disability due to an accepted employment-related injury has the burden of proof to establish by the weight of the substantial, reliable, and probative evidence that the disability for which he or she claims compensation is causally related to the accepted injury. This burden of proof requires that a claimant furnish medical evidence from a physician who, on the basis of a complete and accurate factual and medical history, concludes that, for each period of disability claimed, the disabling condition is causally related to the employment injury, and supports that conclusion with medical reasoning.<sup>6</sup> Where no such rationale is present, the medical evidence is of diminished probative value.<sup>7</sup>

### **ANALYSIS**

The Board finds that appellant has not met his burden of proof to establish recurrence of disability, commencing February 16, 2018, causally related to his accepted April 23, 2008 employment injury.

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<sup>3</sup> 20 C.F.R. § 10.5(x); *see S.F.*, 59 ECAB 525 (2008). *See* 20 C.F.R. § 10.5(y) (defines recurrence of a medical condition as a documented need for medical treatment after release from treatment for the accepted condition).

<sup>4</sup> *Id.*

<sup>5</sup> Federal (FECA) Procedure Manual, Part 2 -- Claims, *Recurrences*, Chapter 2.1500.2 (June 2013). *Kenneth R. Love*, 50 ECAB 193, 199 (1998).

<sup>6</sup> *H.T.*, Docket No. 17-0209 (issued February 8, 2019); *Ronald A. Eldridge*, 53 ECAB 218 (2001).

<sup>7</sup> *E.M.*, Docket No. 19-0251 (issued May 16, 2019); *Mary A. Ceglia*, Docket No. 04-0113 (issued July 22, 2004).

In his October 7, 2016 report, Dr. DiGiacinto indicated that he began treating appellant in 1998 for ongoing back pain. He recounted appellant's medical history, including the accepted April 23, 2008 employment injury, and opined that that incident was a major causative factor in his requiring cervical and lumbar spine surgery. The Board finds that, while Dr. DiGiacinto's opinion is generally supportive of causal relationship, he did not provide sufficient medical rationale explaining how appellant's conditions and cervical spine surgery were causally related to the accepted April 23, 2008 employment injury. Further, Dr. DiGiacinto also attributed appellant's disability, in part, to preexisting and other conditions not accepted as work related, rendering the cause of his disability unclear. Therefore, the Board finds that this evidence is insufficient to establish a recurrence of disability.<sup>8</sup>

In her June 29, 2016 and July 2, 2018 reports, Dr. Elmore stated that appellant had a long-standing history of neck issues dating back to 2008 when he was originally injured in the accepted April 23, 2008 employment incident. She noted that he underwent an MRI scan that revealed damage to the disc at C4-5 and C5-6, especially to the left. Appellant then underwent a repeat MRI scan following an injury when he hit his head on a metal shed door while working as a firearms instructor without any reported loss of consciousness, but with reports of headaches and increased neck pain. Dr. Elmore found that the repeat MRI scan revealed mild interval change with worsening disc pathology at C4-6; however, she did not provide a rationalized medical explanation to support her conclusion that appellant was disabled as a result of the accepted April 23, 2008 employment incident. Therefore, her reports are also insufficient to support a worsening of appellant's accepted employment-related condition to establish a recurrence of disability.<sup>9</sup>

Appellant also submitted a June 2, 2015 report from Dr. Robinton who opined that his EMG and nerve conduction studies revealed evidence of polyradiculopathy. However, the Board has held that medical evidence that does not offer an opinion regarding the cause of an employee's condition is of no probative value on the issue of causal relationship.<sup>10</sup> Therefore, this evidence is insufficient to satisfy appellant's recurrence claim.

Appellant may submit new evidence or argument with a written request for reconsideration to OWCP within one year of this merit decision, pursuant to 5 U.S.C. § 8128(a) and 20 C.F.R. §§ 10.605 through 10.607.

### **CONCLUSION**

The Board finds that appellant has not met his burden of proof to establish a recurrence of disability, commencing February 18, 2016, causally related to his accepted April 23, 2008 employment injury.

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<sup>8</sup> See *Sedi L. Graham*, 57 ECAB 494 (2006) (medical form reports and narrative statements merely asserting causal relationship generally do not discharge a claimant's burden of proof).

<sup>9</sup> *Id.*

<sup>10</sup> See *L.B.*, Docket No. 18-0533 (issued August 27, 2018); *D.K.*, Docket No. 17-1549 (issued July 6, 2018).

**ORDER**

**IT IS HEREBY ORDERED THAT** the August 21, 2018 decision of the Office of Workers' Compensation Programs is affirmed.

Issued: September 23, 2019  
Washington, DC

Janice B. Askin, Judge  
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge  
Employees' Compensation Appeals Board

Valerie D. Evans-Harrell, Alternate Judge  
Employees' Compensation Appeals Board